2010

N.A.R. Inc. v. Daniel W. Whittington : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

N.A.R. INC., Plaintiff and Appellee, vs. DANIEL W. WHITTINGTON, Defendant and Appellant.	**DOCKET NO. 20100754-CA** Third District Court Case No. 100907128

OPENING BRIEF OF THE APPELLEE

APPEAL FROM THE ORDER AND JUDGMENT OF THE HONORABLE JOSEPH C. FRATTO, SIGNED ON AUGUST 20, 2010 AND ENTERED ON AUGUST 25, 2010

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes

JURISDICTION

The Utah Supreme Court has original appellate jurisdiction over this matter pursuant to Utah Code Ann. § 78-31a-129(1)(a) (2010) and Utah Code Ann. § 78-2-2(3)(j) (2010). Pursuant to Utah Code Ann. § 78-2-2(4) (2010), this matter was assigned to the Utah Court of Appeals, by Order of the Utah Supreme Court, dated September 17, 2010, and effective September 27, 2010.

STANDARD OF REVIEW

"An appellate court reviews a trial court's legal conclusions and ultimate grant or denial of summary judgment for correctness and views the facts and all reasonable inferences drawn therefrom in the light most favorable to the nonmoving party." *Martin v. Lauder*, 2010 UT App 216, ¶ 4, 239 P.3d 519 (internal quotations marks omitted).

DETERMINATIVE STATUTORY PROVISIONS

I. Utah Rules of Civil Procedure, Rule 7

(a) Pleadings. There shall be a complaint and an answer; a reply to a counterclaim; an answer to a cross claim, if the answer contains a cross claim; a third party complaint, if a person who was not an original party is summoned under the provisions of Rule 14; and a third party answer, if a third party complaint is served. No other pleading shall be allowed, except that the court may order a reply to an answer or a third party answer.

(b)(1) Motions. An application to the court for an order shall be by motion which, unless made during a hearing or trial or in proceedings before a court commissioner, shall be made in accordance with this rule. A motion shall be in writing and state succinctly and with particularity the relief sought and the grounds for the relief sought.

(b)(2) Limit on order to show cause. An application to the court for an order to show cause shall be made only for enforcement of an existing order or for sanctions for violating an existing order. An application for an order to show

cause must be supported by an affidavit sufficient to show cause to believe a party has violated a court order.

(c) Memoranda.

(c)(1) Memoranda required, exceptions, filing times. All motions, except uncontested or ex parte motions, shall be accompanied by a supporting memorandum. Within ten days after service of the motion and supporting memorandum, a party opposing the motion shall file a memorandum in opposition. Within five days after service of the memorandum in opposition, the moving party may file a reply memorandum, which shall be limited to rebuttal of matters raised in the memorandum in opposition. No other memoranda will be considered without leave of court. A party may attach a proposed order to its initial memorandum.

(c)(2) Length. Initial memoranda shall not exceed 10 pages of argument without leave of the court. Reply memoranda shall not exceed 5 pages of argument without leave of the court. The court may permit a party to file an over-length memorandum upon ex parte application and a showing of good cause.

(c)(3) Content.

(c)(3)(A) A memorandum supporting a motion for summary judgment shall contain a statement of material facts as to which the moving party contends no genuine issue exists. Each fact shall be separately stated and numbered and supported by citation to relevant materials, such as affidavits or discovery materials. Each fact set forth in the moving party's memorandum is deemed admitted for the purpose of summary judgment unless controverted by the responding party.

(c)(3)(B) A memorandum opposing a motion for summary judgment shall contain a verbatim restatement of each of the moving party's facts that is controverted, and may contain a separate statement of additional facts in dispute. For each of the moving party's facts that iscontroverted, the opposing party shall provide an explanation of the grounds for any dispute, supported by citation to relevant materials, such as affidavits or discovery materials. For any additional facts set forth in the opposing memorandum, each fact shall be separately stated and numbered and supported by citation to supporting materials, such as affidavits or discovery materials.

(c)(3)(C) A memorandum with more than 10 pages of argument shall contain a table of contents and a table of authorities with page references.

(c)(3)(D) A party may attach as exhibits to a memorandum relevant portions of documents cited in the memorandum, such as affidavits or discovery materials.

(d) Request to submit for decision. When briefing is complete, either party may file a "Request to Submit for Decision." The request to submit for decision

shall state the date on which the motion was served, the date the opposing memorandum, if any, was served, the date the reply memorandum, if any, was served, and whether a hearing has been requested. If no party files a request, the motion will not be submitted for decision.

(e) Hearings. The court may hold a hearing on any motion. A party may request a hearing in the motion, in a memorandum or in the request to submit for decision. A request for hearing shall be separately identified in the caption of the document containing the request. The court shall grant a request for a hearing on a motion under Rule 56 or a motion that would dispose of the action or any claim or defense in the action unless the court finds that the motion or opposition to the motion is frivolous or the issue has been authoritatively decided.

(f) Orders.

(f)(1) An order includes every direction of the court, including a minute order entered in writing, not included in a judgment. An order for the payment of money may be enforced in the same manner as if it were a judgment. Except as otherwise provided by these rules, any order made without notice to the adverse party may be vacated or modified by the judge who made it with or without notice. Orders shall state whether they are entered upon trial, stipulation, motion or the court's initiative.

(f)(2) Unless the court approves the proposed order submitted with an initial memorandum, or unless otherwise directed by the court, the prevailing party shall, within fifteen days after the court's decision, serve upon the other parties a proposed order in conformity with the court's decision. Objections to the proposed order shall be filed within five days after service. The party preparing the order shall file the proposed order upon being served with an objection or upon expiration of the time to object.

(f)(3) Unless otherwise directed by the court, all orders shall be prepared as separate documents and shall not incorporate any matter by reference.

II. Utah Rules of Civil Procedure, Rule 36

(a) Request for admission.

(a)(1) A party may serve upon any other party a written request for the admission, for purpose of the pending action only, of the truth of any matters within the scope of Rule 26(b) set forth in the request that relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request. The request for admission shall contain a notice advising the party to whom the request is made that, pursuant to Rule 36, the matters shall be deemed admitted unless said request is responded to within 30 days after service of the request or within such shorter or longer time as

the court may allow. Copies of documents shall be served with the request unless they have been or are otherwise furnished or made available for inspection and copying. Without leave of court or written stipulation, requests for admission may not be served before the time specified in Rule 26(d).

(a)(2) Each matter of which an admission is requested shall be separately set forth. The matter is admitted unless, within thirty days after service of the request, or within such shorter or longer time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by his attorney, but, unless the court shortens the time, a Appellant shall not be required to serve answers or objections before the expiration of 45 days after service of the summons and complaint upon him. If objection is made, the reasons therefor shall be stated. The answer shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify his answer or deny only a part of the matter of which an admission is requested, he shall specify so much of it as is true and qualify or deny the remainder. An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless he states that he has made reasonable inquiry and that the information known or readily obtainable by him is insufficient to enable him to admit or deny. A party who considers that a matter of which an admission has been requested presents a genuine issue for trial may not, on that ground alone, object to the request; he may, subject to the provisions of Rule 37(c), deny the matter or set forth reasons why he cannot admit or deny it.

(a)(3) The party who has requested the admissions may move to determine the sufficiency of the answers or objections. Unless the court determines that an objection is justified, it shall order that an answer be served. If the court determines that an answer does not comply with the requirements of this rule, it may order either that the matter is admitted or that an amended answer be served. The court may, in lieu of these orders, determine that final disposition of the request be made at a pretrial conference or at a designated time prior to trial. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

(b) Effect of admission. Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission. Subject to the provisions of Rule 16 governing amendment of a pretrial order, the court may permit withdrawal or amendment when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice him in maintaining his action or defense on the merits. Any admission made by a party under this rule is for the purpose of the pending

action only and is not an admission by him for any other purpose nor may it be used against him in any other proceeding.

III. Utah Rules of Civil Procedure, Rule 56

(a) For claimant. A party seeking to recover upon a claim, counterclaim or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move for summary judgment upon all or any part thereof.

(b) For defending party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought, may, at any time, move for summary judgment as to all or any part thereof.

(c) Motion and proceedings thereon. The motion, memoranda and affidavits shall be in accordance with Rule 7. The judgment sought shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case not fully adjudicated on motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of affidavits; further testimony; defense required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule,

an adverse party may not rest upon the mere allegations or denials of the pleadings, but the response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. Summary judgment, if appropriate, shall be entered against a party failing to file such a response.

(f) When affidavits are unavailable. Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits made in bad faith. If any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party presenting them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

IV. Utah Rules of Evidence, Rule 803(6)

Rule 803. Hearsay exceptions; availability of declarant immaterial.

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(6) Records of regularly conducted activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with Rule 902(11), Rule 902(12), or a statute permitting certification, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

V. Utah Rules of Appellate Procedure – Rule 24(a)(9)

(a) Brief of the appellant. The brief of the appellant shall contain under appropriate headings and in the order indicated:

(a)(9) An argument. The argument shall contain the contentions and reasons of the appellant with respect to the issues presented, including the grounds for reviewing any issue not preserved in the trial court, with citations to the authorities, statutes, and parts of the record relied on. A party challenging a fact finding must first marshal all record evidence that supports the challenged finding. A party seeking to recover attorney's fees incurred on appeal shall state the request explicitly and set forth the legal basis for such an award.

STATEMENT

I. NATURE OF THE CASE.

This is a case about the Defendant's failure to meet his contractual obligations with Mountain America Federal Credit Union (MACFU). The Defendant borrowed money from MACFU for flight school. He then went on to obtain his pilot's license, but failed to pay back his debt. The right to collect this unpaid debt was assigned to the Plaintiff.

II. COURSE OF PROCEEDINGS BELOW.

At the trial court level, the Defendant filed his answer to the Plaintiff's complaint raising the possibility that he was not the person that obtained the loan from MACFU. The Plaintiff reviewed the evidence in the file and only found every indication that the Defendant was the person that obtained the educational loan from MACFU. The Plaintiff propounded discovery to the Defendant in an effort to ascertain what further proof he had of his claims. The Defendant did not answer the Plaintiff's request for admissions, interrogatories, and request for production of documents. As such, the Plaintiff moved for summary judgment on the basis of

the Defendant's failure to respond to the discovery, and the testimony of Gavin Duckworth. The Defendant chose a variety of tactics to attempt mount a collateral attack on Plaintiff's Motion for Summary Judgment. However, he never directly controverted the Plaintiff's list of undisputed facts, did not respond with any evidence of his own as he was required to under the Utah Rules of Evidence, and never requested that the court allow him more time to respond to the Plaintiff's discovery.

It should be noted that the Defendant filed other adversarial motions, to which the Plaintiff responded and the trial court did not directly rule upon. However, it can be assumed that all of the Defendant's motions were resolved by implication in the favor of the Plaintiff. *State v. Mullins,* 2005 UT 43, ¶ 8, 116 P.3d 374.

III. DISPOSITION BY TRIAL COURT.

By Order dated August 20, 2010 , the trial court granted the Plaintiff's Motion for Summary Judgment.

STATEMENT OF FACTS

1. On or about February 4, 2008, the Defendant sought a loan from MAFCU for the purpose of financing a portion of his educational expenses with the Air Center of Salt Lake and Wasatch Helicopter Academy. *Education Line of Credit Agreement*, Exhibit "A" to Plaintiff's Memorandum

in Support of Motion for Summary Judgment, R. 35-36; Affidavit of Gavin Duckworth, R. 63-64.

2. On February 4, 2008, the Defendant signed the MAFCU Membership Application, whereby he acknowledged receipt of and agreed to the terms and conditions of the Truth In Savings Disclosure and Membership Agreement. *Membership Application and Truth in Savings Disclosure and Membership Agreement*, Exhibit "A" to Plaintiff's Memorandum in Support of Motion for Summary Judgment, R. 37, 38-41; Affidavit of Gavin Duckworth, R. 65, 66-69.

3. The Defendant indicated that his residence address was 13232 South 300 East, Draper, Utah, 84020 on his MAFCU Membership Application. *Membership Application*, Exhibit "A" to Plaintiff's Memorandum in Support of Motion for Summary Judgment, R. 37; Affidavit of Gavin Duckworth, R. 65.

4. Under the Truth In Savings Disclosure and Membership Agreement, the Defendant agreed that his signing a signature card or opening or continuing to have an account with MAFCU constituted his acceptance and agreement to the terms and rules contained in the Truth In Savings Disclosure and Membership Agreement. *Truth In Savings Disclosure and Membership Agreement*, Exhibit "A" to Plaintiff's Memorandum in Support of Motion for Summary Judgment, R. 38; Affidavit of Gavin Duckworth, R. 66.

5. Under the Truth In Savings Disclosure and Membership Agreement, Defendant agreed to be liable for the costs to collect any unpaid deficits including reasonable attorney's fees. *Truth In Savings Disclosure and Membership Agreement*, Exhibit "A" to Plaintiff's Memorandum in Support of Motion for Summary Judgment, R. 38; Affidavit of Gavin Duckworth, R. 66.

6. On February 4, 2008, the Defendant signed the MAFCU Education Line of Credit Agreement, thereby entering into an agreement with MAFCU to borrow $20,000.00 to pay for his educational expenses. *Education Line of Credit Agreement*, Exhibit "A" to Plaintiff's Memorandum in Support of Motion for Summary Judgment, R. 35-36; Affidavit of Gavin Duckworth, R. 63-64.

7. Upon entering into the agreement, the Defendant provided his residence address as 13232 South 300 East, Draper, Utah, 84020. *Education Line of Credit Agreement*, Exhibit "A" to Plaintiff's Memorandum in Support of Motion for Summary Judgment, R. 35; Affidavit of Gavin Duckworth, R. 63.

8. Under the agreement, the Defendant agreed to repay the principal balance of $20,000.00, plus interest at the rate of 6.25% per annum until his loan was repaid. *Education Line of Credit Agreement*, Exhibit "A" to Plaintiff's Memorandum in Support of Motion for Summary Judgment, R. 35; Affidavit of Gavin Duckworth, R. 63.

9. Under the agreement, the Defendant agreed to repay the loan in accordance with The Repayment Period as described in the Educational Line of Credit Agreement. *Education Line of Credit Agreement*, Exhibit "A" to Plaintiff's Memorandum in Support of Motion for Summary Judgment, R. 35; Affidavit of Gavin Duckworth, R. 63.

10. In conjunction with entering into the agreement with MACFU for the educational loan, the Defendant provided MAFCU with the School Certification, which indicates that as of January 23, 2008, the Defendant was enrolled at Air Center of Salt Lake for the academic year of February 1, 2008 through February 1, 2009. *School Certification*, Exhibit "A" to Plaintiff's Memorandum in Support of Motion for Summary Judgment, R. 43-44; Affidavit of Gavin Duckworth, R. 71-72.

11. In conjunction with entering into the agreement with MACFU for the educational loan, the Defendant provided MAFCU with another School Certification, which indicates that as of March 31, 2008, the Defendant was also enrolled at Wasatch Helicopter Academy for the academic year of April 1, 2008 through April 1, 2009. *School Certification*, Exhibit "A" to Plaintiff's Memorandum in Support of Motion for Summary Judgment, R. 45-46; Affidavit of Gavin Duckworth, R. 73-74.

12. The Defendant provided MAFCU with the Proof of Enrollment, which indicates that the Defendant was enrolled at Wasatch Helicopter Academy

on March, 26, 2009. [1] *Proof of Enrollment*, Exhibit "A" to Plaintiff's Memorandum in Support of Motion for Summary Judgment, R. 42; Affidavit of Gavin Duckworth, R. 70.

13. In conjunction with entering into the agreement and as part of the application process, the Defendant provided MAFCU with his U.S. Individual Income Tax Return for 2006 ("Tax Return"). *U.S. Individual Income Tax Return*, Exhibit "A" to Plaintiff's Memorandum in Support of Motion for Summary Judgment, R. 47-56; Affidavit of Gavin Duckworth, R. 75-84.

14. The Defendant's Tax Return indicates that his residence address was located at 13232 South 300 East, Draper, Utah, 84020. *U.S. Individual Income Tax Return*, Exhibit "A" to Plaintiff's Memorandum in Support of Motion for Summary Judgment, R. 47, 55; Affidavit of Gavin Duckworth, R. 75, 83.

15. MAFCU disbursed $20,000.00 to the Defendant and/or his educational institutions pursuant to the terms of the agreement. *Account Statement*, Exhibit "A" to Plaintiff's Memorandum in Support of Motion for Summary Judgment, R. 58; Affidavit of Gavin Duckworth, R. 85.

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[1] It is a matter of public record that a Daniel Whittington, with the same address as that of the Defendant, is licensed with the Federal Aviation Administration to fly both fixed wing and rotary aircraft and is a Member of Heli Dudes L.L.C.

16. The Defendant failed to repay his loan from MAFCU. Request for Admissions, ¶ 8, Exhibit "A" to Plaintiff's Memorandum in Support of Motion for Summary Judgment, R. 31.

17. The Defendant's loan account was assigned to the Plaintiff, N.A.R., Inc., for collection. Request for Admissions, ¶ 7, Exhibit "A" to Plaintiff's Memorandum in Support of Motion for Summary Judgment, R. 31; Affidavit of Gavin Duckworth, ¶ 4, R. 61.

18. On or about April 9, 2010, the Plaintiff prepared the Summons and Complaint in order to collect the Defendant's unpaid debt. Complaint, R. 1-4; Summons, R. 5-7.

19. On April 14, 2010, the Summons and Complaint were served personally upon the Defendant at his residence address located at 13232 South 300 East, Draper, Utah, 84020. Affidavit of Service, R. 5-7.

20. The Defendant filed his answer to the Plaintiff's Complaint on or about May 19, 2010. Answer, R. 8-11.

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

21. On May 25, 2010, the Plaintiff served the Defendant with Plaintiff's First Set of Interrogatories, Request for Production of Documents, and Request for Admissions ("Plaintiff's Discovery"). Certificate of Service, R. 14.

22. In the Request for Admissions in the Plaintiff's Discovery, the Plaintiff alleged that the Defendant was indebted to MAFCU under the

terms of a written agreement "in the amount of $19,999.98, for financial services, together with interest thereon at 6.25% per annum since 12/16/2009, the approximate date of default." Request for Admissions, ¶ 5, Exhibit "A" to Plaintiff's Memorandum in Support of Motion for Summary Judgment, R. 31.

23. The Request for Admissions contained the allegation that the breakdown of charges found as Exhibit B to the admissions accurately reflected the amounts that the Defendant owed to the Plaintiff. Request for Admissions, ¶ 9, Exhibit "A" to Plaintiff's Memorandum in Support of Motion for Summary Judgment, R. 31.

24. The Defendant did not deny the Plaintiff's Request for Admissions or respond to any other of the discovery requests propounded by the Plaintiff. Memorandum in Support of Motion for Summary Judgment, R. 21.

25. On July 1, 2010, the Plaintiff served the Defendant with Plaintiff's Motion for Summary Judgment, Memorandum in Support of Motion for Summary Judgment, and the Affidavit of Gavin Duckworth, which was filed with the trial court on or about July 6, 2010. Certificate of Service (Plaintiff's Motion for Summary Judgment, Memorandum in Support of Motion for Summary Judgment and Affidavit of Gavin Duckworth), R. 16.

26. The Defendant filed his unsigned Answer to Plaintiff's Motion for Summary Judgment on or about July 16, 2010. Answer to Plaintiff's Motion for Summary Judgment (Unsigned), R. 93-94.

27. The Defendant's Answer to Plaintiff's Motion for Summary Judgment was unsigned and did not contain a supporting affidavit or any admissible evidence. Answer to Plaintiff's Motion for Summary Judgment (Unsigned), R. 93-94.

28. The Defendant's Answer to Plaintiff's Motion for Summary Judgment also did not contain any legal authority including citations to the Utah Rules of Civil Procedure, citations to the Utah Rules of Evidence, or citations to Utah Statutes and/or case laws. Answer to Plaintiff's Motion for Summary Judgment (Unsigned), R. 93-94.

29. The Defendant's Answer to Plaintiff's Motion for Summary Judgment also failed to controvert the facts alleged in Plaintiff's Motion for Summary Judgment as required by Rule 7 of the Utah Rules of Civil Procedure. Answer to Plaintiff's Motion for Summary Judgment (Unsigned), R. 93-94.

30. On July 21, 2010, the Plaintiff served the Defendant with the Plaintiff's Reply Memorandum, which was filed with the trial court on or about July 22, 2010. Plaintiff's Reply Memorandum, R. 107-114.

31. On July 22, 2010, the Plaintiff served the Defendant with its Request to Submit for Decision on Plaintiff's Motion for Summary Judgment, which was filed with the trial court on or about July 29, 2010. Certificate of Service, R. 120, 121.

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

32. On or about July 6, 2010, the Defendant filed Defendant's Motion for Summary Judgment or in lieu of it Motion to Strike Interrogatories. In it, the Defendant alleged that the Plaintiff failed to state a claim and that the Plaintiff must prove that the Defendant is the one and only Daniel W. Whittington. Defendant's Motion for Summary Judgment or in lieu of it Motion to Strike Interrogatories, R. 15-16.

33. The Defendant's Motion did not contain a supporting affidavit or any admissible evidence and did not contain any legal authority including citations to the Utah Rules of Civil Procedure, citations to the Utah Rules of Evidence, or citations to Utah Statutes and/or case laws. Defendant's Motion for Summary Judgment or in lieu of it Motion to Strike Interrogatories, R. 15-16.

34. On or about July 9, 2010, the Plaintiff responded by filing Plaintiff's Memorandum in Opposition of Defendant's Motion for Summary Judgment, which was filed with the trial court on or about July 13, 2010. In it, the Plaintiff objected to Defendant's Motion for Summary Judgment on the basis that the Defendant failed to provide an affidavit or admissible evidence and that it failed to contain any legal authority. Plaintiff's Memorandum in Opposition of Defendant's Motion for Summary Judgment, R. 86-92.

35. On or about July 20, 2010, the Defendant filed his Rebuttal to Plaintiff's Memorandum in opposition to Summary Judgment. The Defendant's rebuttal did not contain an affidavit or any legal authority in support of the conclusions alleged therein. Rebuttal to Plaintiff's Memorandum in opposition to Summary Judgment, R. 97-99.

36. On July 20, 2010, the Plaintiff served its Motion to Strike Defendant's Rebuttal to Plaintiff's Memorandum in Opposition to Summary Judgment on the basis that it does not provide any legal authority and proffers erroneous legal conclusions. Motion and Memorandum in Support of Motion to Strike Defendant's Rebuttal to Plaintiff's Memorandum in Opposition to Summary Judgment, R. 100-101, 102-106.

DEFENDANT'S MOTION FOR RULING

37. On or about August 2, 2010, the Defendant filed his Motion for Ruling and to Dismiss With Prejudice. Motion for Ruling and to Dismiss With Prejudice, R. 122-123.

38. The Plaintiff responded to the Defendant's Motion for Ruling by filing Plaintiff's Memorandum in Opposition of Defendant's Motion for Ruling and to Dismiss with Prejudice, which was filed with the trial court on or about August 3, 2010. Plaintiff's Memorandum in Opposition of Defendant's Motion for Ruling and to Dismiss with Prejudice, R. 124-128.

39. On or about August 20, 2010, the trial court granted summary judgment in favor of the Plaintiff and against the Defendant. Order Granting Plaintiff's Motion for Summary Judgment, R. 129.

40. The trial court entered Summary Judgment against the Defendant in the amount of $19,999.98, plus costs, reasonable attorneys' fees, and interest on the total judgment at 6.25% per annum from the date of judgment until paid, for a total amount of $22,023.98. Summary Judgment, R. 130-131.

SUMMARY OF ARGUMENT

The district court properly concluded that based upon the evidence and argument submitted by the parties that that there was not a genuine issue of a material fact as to the Defendant's liability to MACFU. Therefore, summary judgment in favor of the Plaintiff was appropriate.

ARGUMENT

I. THE APPELLANT'S BRIEF ARGUES MATTERS NOT PRESERVED FOR APPEAL

To properly preserve an issue for appeal it must first be raised at the trial court. *O'Dea v. Olea*, 2009 UT 46, 217 P.3d 704. The reason for this is to bring the objection to the trial court's attention, and allow it to make any needed corrections while in the course of the proceeding. *Id.* In order to preserve an issue for appeal the "following must take place: (1) the issue must be raised in a timely fashion; (2) the issue must be specifically raised; and (3) a party must introduce supporting evidence or relevant legal authority." *Id.* In addition, in his brief the Appellant must accurately cite to the record which demonstrates that the issue was preserved in the trial court. UTAH R. APP. P. 24(a)(5)(A)-(B) (2010).

The first issue raised by the Appellant is a claim of error based on an argument relating to the use of copies of documents in evidence.[2] The Appellant failed to specifically raise this issue in response to the Appellee's Motion for Summary Judgment, and where he may have referenced a general dislike for copies of documents, he did not provide any legal authority and did not object in such a manner that would have afforded the trial court the opportunity to rule upon his objection and would have given the Appellee an opportunity to respond.

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[2] Even if the Appellant had preserved this issue below, this objection would have been a non-argument given his failure to respond to the Appellee's discovery and the Appellee's Motion for Summary Judgment as more fully described below.

The second issue raised by the Appellant relates to the Affidavit of Gavin Duckworth. Although the Appellant has cited his "Rebuttal to Plaintiff Appellee's Memorandum in Opposition to Summary Judgment" as the basis for his preservation of this objection, this one paged and unsigned document did not make a specific objection to the affidavit or provide any legal authority for this purported objection.

The fourth issue raised by the Appellant related to a purported request for original documents. The Appellant failed to specifically raise this issue in response to the Appellee's Motion for Summary Judgment and where he may have referenced his dislike for copies of documents, he did provide any relevant legal authority for his complaint. The Appellant never made a request, formally or informally, of the Appellee for original copies of his documents so that he might have an expert examine his signature.

Because the Appellant has failed to properly preserve these issues for appeal, this Court should give his arguments on these issues no weight or consideration.

II. THE TRIAL COURT PROPERLY FOUND THAT THERE WAS NOT A GENUINE ISSUE AS TO ANY MATERIAL FACT AND THAT SUMMARY JUDGMENT WAS PROPER

In order for the moving party to be successful in a motion for summary judgment it has the initial burden to "show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." UTAH R. CIV. P. 56(c); *see also L & A Drywall v. Whitmore Construction*

Co., 608 P.2d. 626 (Utah 1980). However, once this has taken place it is then the non-moving party's burden to "demonstrate the existence of a genuine issue of material fact." *Uintah Basin Medical Center v. Hardy*, 2008 UT 15 ¶ 16, 179 P.3d 786, 789-90 (Utah 2008). The non-moving party must go beyond the pleadings and "set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.* 477 U.S. 242, 250 (1986) (internal quotation marks and citation omitted). Specifically, the non-moving party cannot rely solely on the allegations in his Answer, but he must respond with his own admissible evidence such as affidavits or discovery responses so that a reasonable juror may find in his favor. UTAH R. CIV. P. 56(e) (2010). *See, e.g., Vermef v. City of Boulder City*, 80 P.3d 445 (Nev. 2003) (overruled on other grounds by, *ASAP Storage, Inc. v. City of Sparks*, 123 Nev. 639, 173 P.3d 734 (2007)); *Chiang v. Verizon New England Inc.*, 595 F.3d 26 (1st Cir. 2010) (although the standards for summary judgment are highly favorable to the nonmoving party, the nonmovant still has a burden to produce evidence sufficient for a reasonable juror to find in his or her favor). While there may be a material fact in dispute, the Appellant in his response must demonstrate that there is a genuine issue as to that material fact to successfully oppose a summary judgment motion. UTAH R. CIV. P. 56 (2010).

The Appellee met its burden to show that there was not an issue of material fact and it was entitled to judgment as a matter of law through

undisputed factual allegations, documentary evidence, responses (or lack of) to discovery, and testimony by affidavit.

A. THE APPELLANT FAILED TO ANSWER THE APPELLEE'S DISCOVERY REQUESTS CREATING UNDISPUTED ISSUES OF FACT

Under Rule 36(a), Utah Rules of Civil Procedure, a party must respond within thirty (30) days after service of the Request for Admissions or the matters shall be deemed admitted as a matter of law. Unanswered admissions are automatically deemed admitted on the thirty-first day from service of the request, and a "trial court does not have discretion to unilaterally disregard the admissions." *Kotter v. Kotter*, 2009 UT App 60 ¶ 16, 206 P.3d 633, 625 (Utah Ct. App. 2009) *citing Langeland v. Monarch Motors, Inc.*, 952 P.2d 1058, 1060 (Utah 1998).

The case in *Kotter* involved a divorce where at the time the husband served the wife with a Request for Admissions, the wife was acting *pro se*. The wife did not respond within the time allowed, or at all, and failed to file a motion to withdraw the admissions. Consequently, the court held that she had admitted to the values ascribed by the husband to certain marital property. [3]

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[3] The *Kotter* Court also reiterated the legal maxim that although an admission may be objectionable as it may call for a legal conclusion, if no objection is made that argument is waived. *Jensen v. Pioneer Dodge Ctr., Inc.,* 702 P.2d 98, 100-101 (Utah 1985).

The present case is similar to *Kotter*. The Appellee served its Request for Admissions on the Appellant on May 25, 2010. R. 14. The Appellee's Request for Admissions included the required language advising the Appellant that a failure to respond to the Request for Admissions within thirty days will result in the matters being deemed admitted. Instructions, ¶ 14, Exhibit "A" to Plaintiff's Memorandum in Support of Motion for Summary Judgment, R. 30-31.

The Appellee placed this language as the last instruction, and right before the Request for Admissions, so it would be readily visible to the Appellant. Allowing for an additional three days for mailing, the Appellant's responses would have needed to have been served upon Plaintiff on or before June 27, 2010, to avoid the admissions being deemed admitted as a matter of law.

The Appellant never answered the Appellee's Request for Admissions, or any of the other discovery requests. Most notably, the Appellee's fifth Request for Admission asked that the Appellant admit that he was liable under the agreement that was the basis for the loan that was issued by MACFU. By his failure to deny these admissions the law answered them for him in the affirmative, sealing his liability on Plaintiff's claims. Accordingly, his unsupported self-serving allegation that he is not the one liable for this debt has no merit and could not have been a valid basis for the trial court to deny the Appellee's Motion for Summary Judgment. Appellant did file a Motion for Summary Judgment or in lieu of it

Motion to Strike Interrogatories after his time had run to answer the admissions.[4] [5] However, this motion did not answer the Appellee's discovery requests and was not served upon the Appellee until July 1, 2010. Although the trial court did not directly rule upon this motion, as indicated above, "[w]hen a final disposition of a case is entered by a district court, any unresolved motions inconsistent with that disposition are deemed resolved by implication" in favor of the party prevailing on

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[4] The Appellant's motion requested that the case be dismissed, and asked the trial court to strike the Appellee's interrogatories. It did not cite any legal basis for his requests. In addition, it did not even mention the admissions, let alone request more time or request that the Appellant may withdraw the now admitted facts. Were this Court to construe this motion as a request to withdraw, it would have to review the trial court's actions under a two step process which included the need for the Appellant to provide "evidence of specific facts contradicting the admissions." *Barnes v. Clarkson*, 178 P.3d 930, 597 Utah Adv. Rep. 18, 2008 UT App 44 ¶ 16. In the present case, the Appellant did not provide a single stitch of evidence, admissible or not, to support such an argument. Therefore, even considering the most liberal construction of his motion, he could not have succeeded in withdrawing his admissions.

[5] The Appellant dated his motion June 28, 2010, but did not mail it to the Appellee until July 1, 2010.

the final disposition. *State v. Mullins,* 2005 UT 43, ¶ 8, 116 P.3d 374; *Doctors' Co. v. Drezga*, 2009 UT 60, 218 P.3d 598.

The Appellant failed to respond to the Appellee's Request for Admissions and thereby admitted that he was liable to the Appellee under the terms of the Agreement. He did not provided a single argument as to why he should be relieved of this obligation. Therefore, there was no genuine issue of material fact and the trial court was correct in granting the Appellee's Motion for Summary Judgment.

B. AFTER THE APPELLEE MET ITS BURDEN, THE APPELLANT FAILED TO MEET HIS BURDEN TO SHOW AN ISSUE OF MATERIAL FACT.

As stated above, when a party makes a motion for summary judgment and includes supporting affidavits and discovery materials, the opposing party has the obligation to show, with facts and evidence, that there is a genuine issue for trial.

The admissibility of the Affidavit of Gavin Duckworth, and the exhibits contained therein, was entirely proper. In a motion for summary judgment, "affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." UTAH R. CIV. P. 56(e) (2010). Hearsay is generally excluded from the evidence, unless it meets a particular exception. UTAH R. OF EVID 802 (2010). Rule 803(6) is one such exception which allows a qualified witness to lay the foundation for the introduction of business records. UTAH R. OF EVID 803 (2010). There is no requirement that a qualified

witness be the records custodian. *Hansen v. Heath*, 852 P.2d 977, 981 (Utah 1993). A trial court is given broad discretion in determining the admissibility of evidence under this exception. *Trolley Square Associates v. Nielson*, 886 P.2d 61, 66 (Utah Ct. App. 1994). In addition, duplicates of originals are admissible as evidence. UTAH R. OF EVID. 1003 (2010).

In the present case Gavin Duckworth testified as to matters within his personal knowledge, and laid the foundation for the reliability of the documents attached to his affidavit as follows:

> 1. That I am the Collection Manager for the Plaintiff in the above captioned matter.
>
> 2. That I am competent to testify to the matters stated in this affidavit; I am over eighteen (18) years of age; and, I have personal knowledge of the facts and details surrounding this case.
>
> 3. That I have knowledge of the business practices of the Plaintiff, that the documents attached as exhibits to my affidavit were created in the course of regularly conducted business activity, were provided by the original creditor to the Plaintiff to be used for collection of this account, and that these documents are integrated, adopted and relied upon by the Plaintiff in its daily operations. I have knowledge of the procedures under which these documents were transferred from the original creditor to the Plaintiff for collection of this account. These are true and correct copies of the documents received by Plaintiff. (Exhibit A, Documents).

R. 60 – 85.

This testimony provides the basis as to why Gavin Duckworth was a qualified witness, and laid the foundation for the introduction of the exhibits. These exhibits are admissible business records, and the trial court may properly

rely upon them in ruling on the Appellee's Motion for Summary Judgment. *Superior Receivable Servs. v. Pett,* 2008 UT App 225, 191 P.3d 31 cert. denied (Utah Ct. App. 2009) (finding that the business records attached to the affidavit of the collection agency's office manger were admissible). Furthermore, as was the case here, "[t]he interpretation of an unambiguous contract is a question of law to be determined by the court and may be decided on summary judgment." *Morris v. Mountain States Tel. & Tel. Co.*, 658 P.2d 1199, 1201 (Utah, 1983); *O'Hara v. Hall*, 628 P.2d 1289, 1290 (Utah, 1981); *Mason v. Commercial Union Assurance Companies*, 626 P.2d 428 (Utah, 1981); *Provo City Corp. v. Nielson Scott Co.*, 603 P.2d 803, 805 (Utah, 1979).

When a party makes a properly supported Motion for Summary Judgment the opposing party may not rest upon his pleadings, but had an affirmative duty to respond with affidavits or other materials allowed by Rule 56, Subdivision (e). UTAH R. CIV. P. 56(e) (2008); *see D & L Supply v. Saurini*, 775 P.2d 420 (Utah 1989); *Thayne v. Beneficial Utah, Inc.*, 874 P.2d 120 (Utah 1994). If the opposing party failed to comply, then summary judgment shall be entered against him. UTAH R. CIV. P. 56(e) (2008).

In this case, the Appellee filed a Motion for Summary Judgment with the supporting Affidavit of Gavin Duckworth, and the support of its unanswered discovery. R. 17 - 85. The Appellant has a duty to respond with affidavits, or other materials listed in rule 56(e). Utah R. Civ. P. 56(e) (2010). Those other materials are depositions, answers to interrogatories, or further affidavits. *Id.*

The Appellant did not respond with any of these items in support of his opposition. Therefore, it was proper for the trial court to conclude that there was no genuine issue of material fact in this case, and that Summary Judgment was proper. *Franklin Fin. v. New Empire Dev. Co.*, 659 P.2d 1040 (Utah 1983).

III. THE APPELLEE IS ENTITLED TO AN AWARD OF ITS ATTORNEYS' FEES

"A party seeking to recover attorney's fees incurred on appeal shall state the request explicitly and set forth the legal basis for such an award." Utah R. App. P. 24(a)(9). Also, "[t]he general rule is that when a party who received attorney fees below prevails on appeal, the party is also entitled to fees reasonably incurred on appeal." *Brown v. Richards*, 840 P.2d 143, 156 (Utah Ct. App. 1992).

In the present case, the Appellee explicitly requests that it be awarded its costs and attorneys' fees as have been incurred on appeal. At the trial court, the Appellee was awarded attorneys' fees as part of its Motion for Summary Judgment.

Under the Truth In Savings Disclosure and Membership Agreement, the Appellant agreed to be liable for collection costs including reasonable attorney's fees, and in the Appellee's Request for Admissions, the Appellant also admitted to the obligation to pay the Appellee's attorneys' fees and costs. Accordingly, the Appellee is entitled to its attorneys' fees and costs awarded initially by the district court together with those incurred on appeal.

CONCLUSION

At the trial court, the Appellant failed to respond to the Appellee's discovery including its Request for Admissions, failed to respond to the Appellee's Motion for Summary Judgment with any of the evidence listed in Rule 56(e), and failed to properly preserve the issues he would now like this Court to consider. As a matter of law, and in reviewing all of the facts in the light most favorable to the Appellant, there was no genuine issue of a material fact that would have precluded the trial court from entering summary judgment in the Appellee's favor. Accordingly, the decision of the trial court should be affirmed.

RESPECTFULLY SUBMITTED this 15 day of April, 2011.

OLSON SHANER

CHIP SHANER
B. JOSEPH BEECROFT

CERTIFICATE OF SERVICE

I hereby certify that on this 15 day of April, 2011, a true and correct copy of the foregoing document was served by the method indicated below, to the following:

■ U.S. Mail, Postage Prepaid

DANIEL W WHITTINGTON
13232 S 300 E
DRAPER, UT 84020
DEFENDANT/APPELLANT
PRO SE

BY: _____